

SAC AND FOX NATION,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	Docket No. IBIA 92-193-A
	:	
ACTING ANADARKO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	May 24, 1993

Appellant Sac and Fox Nation seeks review of a May 6, 1992, decision issued by the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), approving appellant's application for a FY 1992 Planning grant in a reduced amount. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Pursuant to an announcement in the Federal Register, 57 FR 162 (Jan. 2, 1992), appellant filed an application for a continuation FY 1992 Planning grant in the amount of \$60,000. Appellant's application, along with those of other tribes under the jurisdiction of the Anadarko Area Office, was reviewed by a panel of three persons. The scores given to appellant by each of the three reviewers were then averaged in order to determine appellant's ranking relative to that of the other applicants. Appellant received a ranking of 71, placing it number 7 out of the 10 tribes applying to the Anadarko Area Office for FY 1992 Planning grants. By letter dated May 6, 1992, the Area Director informed appellant that its application would be funded, but in the reduced amount of \$20,000. Briefing in this case was not concluded until after the start of FY 1993.

Appellant contends that the Area Director and/or Area Office staff were biased against it because it is a self-governance tribe. This belief is set forth first in appellant's notice of appeal and statement of reasons. However, the statement of reasons merely presents appellant's opinion. Appellant cites no specific examples that would support a conclusion that the Area Director was biased against it.

Appellant attached three trip reports to its opening brief in further support of this contention. These trip reports were written by officials of appellant. Two of the reports suggest that one official in BIA's Washington, D.C., office was not in agreement with the decision to delegate Planning grant funding determinations to the Area offices, and that the same official agreed with appellant that the amount awarded to it for FY 1992 was not sufficient to carry out appellant's intended program and suggested that appellant seek a hearing with the Area Office, apparently in an attempt to settle the matter without the necessity of pursuing an appeal. The third

report suggests that the Area Office had not determined priorities for program applications. These trip reports contain nothing that even remotely suggests that the Area Director or Area Office staff were biased against appellant.

Appellant also argues that notations on the rating sheets of two of the three reviewers indicate that the reviewers did not take into consideration the fact that appellant was a self-governance tribe. Presumably, appellant believes that these notations also indicate bias on the part of the reviewers. The Board has considered the notations and the ratings given by the reviewers, and finds no evidence that appellant's application was downgraded either because of the comments or because of bias against appellant.

The Board thus finds no basis for a conclusion that the rating appellant received was influenced by bias.

Appellant asserts that the Area Director based his decision on requirements not communicated to appellant. This argument relates to questions 2 and 3 in section VI of the rating forms. (This section is incorrectly called section IV on the forms.) These questions ask:

2. Does application address consequence of non-payment to [technical assistance] provider for deviation or nonperformance?

3. Does the application request funds to be used as matching shares for other federal or non-federal grant programs?

The space for “no” is checked after each question on all three rating forms. One form also has the notation “n/a” next to question 2.

Appellant contends that these questions represent a “mutation” or “unartful paraphrasing” of the Federal Register announcement of the grant program. The relevant section in the Federal Register is (5) Other Conditions, which provides:

(a) A tribe's application for the purpose of planning must clearly outline a monitoring schedule for planning activities and clearly indicate the person(s) responsible for carrying out each of the grant activities;

(b) Deviation or non-adherence to the planning schedule by a technical assistance provider can result in nonpayment to the provider;

(c) The funds awarded under this announcement may be used as matching shares for any other Federal or non-Federal grant programs which contribute to the purposes for which these grants are made.

(57 FR 163).

Appellant argues:

The Federal Register text in (b) reaffirms the sovereign right of Indian Tribes to withhold payment for bad advice or for failure to meet scheduled commitments. As to (c) the Notice informs the Tribes that other funds may be used to supplement a program, however, the [Area Office's] version leaves the impression that the applicant should have applied for other funds. The altering of the grant requirements, even by mistake, is not allowed.

(Opening brief at 5-6; emphasis in original).

Appellant's contention as to question 2 is apparently that the statement in the Federal Register appears to be merely informational, while the rating sheet question suggests that an application was deficient unless it stated that action would be taken against a technical assistance provider for deviation or nonperformance. Although the Federal Register statement is not a model of clarity, there is no indication in any of the rating sheets that appellant's application was downgraded because it did not contain a statement on nonpayment to technical assistance providers.

The Board disagrees with appellant's interpretation of question 3, and concludes that this question did not suggest that applicants were expected to apply for other funds or that applications were deficient if they did not show that other funds were also being sought.

Appellant also questions the method by which the Area Director reduced its grant request. Appellant argues that the record does not set forth any formula used to make the reduction. It contends that it received only 33.33 percent of the amount it requested, while the tribe that was ranked eighth received 80 percent of the amount it requested.

The Area Director states that if only the Planning grant awards are considered, the reductions appear inconsistent. He argues, however, that in making reductions, both Planning grant and Small Tribes grant applications were considered. Thus, he argues that the tribe ranked eighth under the Planning grant program actually received only 30.07 percent of the total it requested under the two programs. The Area Director contends that grant applications under the two programs were funded on "a descending curve, in which the higher ranked tribes received a higher percentage of their total request and the lower ranked tribes received a lower percentage" (Answer brief at 5). He notes, however, that two tribes, both ranked above appellant under the Planning grant program, each received substantially lower percentages of the amount requested than appellant. He states that this proportionately larger reduction was attributable to the fact that both of these tribes made very large requests. ^{1/}

^{1/} In Three Affiliated Tribes of the Fort Berthold Reservation v. Aberdeen Area Director, 23 IBIA 160, 161 (1993), the Board disapproved combining funding under the Planning grant and Training and Technical Assistance grant programs: "The Federal Register announcement clearly contemplated that funding would be available under two separate and distinct grant programs, which were related only in that they were announced at the same time. There

The Board cannot accept this argument because the funding table does not support it. The Area Director's argument is based upon the combination of the funding requested and awarded under the two grant programs. The Area Director states that the tribe ranked number 1 under the Planning grant program received 100 percent of the amount it requested. This example fails to take into consideration that this same tribe was ranked number 3 under the Small Tribes grant program, and received only 45 percent of the amount it requested under that program. If the Area Director's argument is logically applied, this tribe had an overall ranking of 2 and received 54.17 percent of the funding it requested under the two programs. Each of the Area Director's examples is similarly subject to criticism.

The Board has compared the funding figures in every combination it could envision. Contrary to the Area Director's assertions, the Board found no discernable logical relationship in the reductions under any combination which it tried. This conclusion does not constitute a finding that no relationship exists: it merely finds that the Area Director has failed to demonstrate one and none is immediately evident on the face of the funding table.

The Area Director has discretion in determining how best to allocate scarce funding resources. The Board has upheld awards under grant programs that were less than the amount requested. See, e.g., Wichita and Affiliated Tribes v. Acting Anadarko Area Director, 23 IBIA 157 (1993). At a minimum, reductions may logically and reasonably be made based upon an analysis of a particular application or in an attempt to allocate limited funding to as many tribes as possible. It would also appear that the latter reason for awarding less than the amount requested may reasonably include the use of some kind of formula for determining the amount of these reductions, including perhaps, the "descending curve" which the Area Director argued was used here. However, like other discretionary decisions, any such reductions must be shown to have a reasonable basis. That showing was not made here.

Ordinarily, this finding would result in the Board's vacating the Area Director's decision. However, under the circumstances of this case, the Board declines to do so.

The Anadarko Area Office received \$77,500 in funding for the Planning grant program and \$210,000 for the Small Tribes grant program, for funding totalling \$287,500. Ten tribes sought \$518,308 under the Planning grant program; nine tribes sought \$338,597 under the Small Tribes grant program, for requests totalling \$856,905.

The six tribes ranked ahead of appellant under the Planning grant program requested \$285,134. If the Area Director had not made reductions, appellant would not have been funded at all. Even if all the funds for the

Footnote 1, continued:

is no indication in the announcement that applicants under the two programs were expected to compete against one another." Although the situation in this case is not the same as that addressed in Three Affiliated Tribes, the Area Director should be careful to avoid this potential problem.

Small Tribes grant program had been transferred to the Planning grant program, appellant would have received only \$2,366. ^{2/} The Board thus finds that the Area Director's reduction of funding, even though flawed, benefited appellant.

Although the Board thus declines to vacate this decision, the Area Director is cautioned that he is expected to demonstrate that there is a reasonable basis for any reductions he may make when awarding funds under discretionary grant.

Appellant also contends that the Area Director exercised poor judgment in awarding it less than it requested because the full amount requested was necessary to accomplish the goals and objectives set forth in its application. As the Board stated in response to the same argument in Wichita and Affiliated Tribes, 23 IBIA at 158-159:

The Board sympathizes with appellant's problem, as it does with the problems of those tribes which did not receive even a portion of the funds they sought. The fact remains, however, that the Area Director was faced with allocating scarce funding * *. Appellant's dissatisfaction with not receiving the full amount it requested does not show that the Area Director committed legal error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Anadarko Area Director's May 6, 1992, decision is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

^{2/} For this reason, the Board disagrees with appellant's suggestion that the Area Director abused his discretion in failing to reallocate funds from the Small Tribes grant program to the Planning grant program for the purpose of funding appellant's application.